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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

COMMERCE COMPANY, d/b/a LAMAR HOTEL,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRINTED IN U.S.A. - BY DELARUE TEXAS

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Commerce Company, doing business as Lamar Hotel, petitions for a Writ of Certiorari to review the April 7, 1964, decree of the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

Although not officially reported, the Fifth Circuit opinion is in the Appendix 1a, and is reported in 328 F. 2d 600. No opinion was written on rehearing.

The findings of fact, conclusions of law, and the order of the Board in the Clarification and Decertification cases (R. 39-45) are in the Appendix 5a, and are reported at 137 N.L.R.B. No. 137. The findings of fact, conclusion of law and the order of the Board in the Unfair Labor Practice Case (R. 87-103) are in the Appendix 11a, and are reported at 140 N.L.R.B. No. 32.

JURISDICTION

1. The Decree sought to be reviewed Appendix 3a, was dated and entered on April 7, 1964.

2. The opinion directing entry of a decree enforcing order of National Labor Relations Board Appendix 1a was dated and entered on March 3, 1964.

3. A Petition for Rehearing (R. 171) was filed on March 20, 1964.

4. Order Denying Rehearing (R. 183) was dated and entered on March 30, 1964.

5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. May the lower court lawfully enforce the Board's extension of the certification year and "Order to Bargain" with a repudiated, minority union on a new ground, failure to bargain, even though (1) the Board found and declared the Court's new ground (failure to bargain) to be immaterial and irrelevant, (2) the Board refused to admit evidence on this "failure to bargain" issue, (3) the Board relied on three stated grounds which do not include the Court's "failure to bargain" ground, (4) the Petitioner was advised by the Board that the entire bargaining history (certainly, including a "failure to bargain") during the certification year was not a relevant consideration, and (5) therefore, no evidence of or defense to any such "failure to bargain" charge is in the record?

2. May the lower court lawfully enforce the Board's order on the Court's new ground which was not the basis for the Board's action or should the Board's order be

judged upon the grounds the record discloses was the basis for the Board's order?

3. Did the Board have the *discretion* to "prolong" Petitioner's "duty to bargain" beyond the statutory Certification Year by "granting" the Union a six months' extension of the Certification Year?

STATUTE INVOLVED

The controlling statute — 49 Stat. 453, 61 Stat. 143, 65 Stat. 601, 73 Stat. 525, 29 U.S.C. 159(c)(1)(2) and (3) — provides for decertification petitions; this is the controlling statutory provision:

> "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or . . .
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a *question of representation* affecting commerce exists shall provide for an appropriate *hearing* upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an *election* by secret ballot and shall certify the results thereof.

(2) In determining whether or not a *question of representation* affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought . . .

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held . . ." (Emphasis added)

STATEMENT OF THE CASE

The history of this "order to bargain" case pivots around the September 23, 1960, Certification of the Union (R. 31), and the Board's later dismissal of an employee Decertification Petition filed after the certification year.

After the Certification, a dispute immediately arose with respect to whether the jobs of 11 employees brought them within the Board's unit designation. The Union refused to consider whether the 11 employees were in or outside the unit. Even as late as the "clarification hearing" on December 5, 1961, the Union representative continued to insist that unit placement of the eleven individuals was not a "question that it (the Union) could answer." (R. 155-156)

On December 5, 1961, the Union reversed its original position and agreed with the Petitioner (R. 157):

"MR. McCARTY: We think before we can bargain—"

"HEARING OFFICER: Let's have a—"

"MR. McCARTY:—with any understanding we certainly ought to have the unit clarified so that we know who we are bargaining for."

Petitioner agrees that the resolution of the placement issues was necessary; yet, the Union's refusal for more

than a year to attempt their amicable resolution was not a reasonable basis for extending the Certification Year.

On May 18, 1961, the Union filed a Motion to Clarify (determine the unit placement of 11 employees) and never requested another bargaining meeting. This falls short of justifying the lower Court's finding of a "Failure or Refusal to Bargain". Six months later, on November 6, 1961, the Board, belatedly and after the Certification Year, ordered a hearing on such motion.

At the December 13, 1961 hearing, 14 months after the certification, for the first time, the Union "stated a position" on the unit placement issues; Petitioner quickly agreed on all except one employee; the Board sustained Petitioner's, not the Union's, position on the placement of the only person who continued in dispute (R. 44). The Respondent's attempts to cast Petitioner in a "bad light" on the placement issues are entirely without merit, because the only ultimately disputed issue was resolved in Petitioner's favor.

There is no evidence and no Board finding that Petitioner "deprived" the union of any part of "its" certification year or Petitioner "failed to bargain".

THE DECERTIFICATION PETITION — More than one year after the certification and while the Motion to Clarify was pending, a "Decertification Petition" supported by a clear majority was duly filed pursuant to the statute (R. 142). The Decertification Petitioner notified Petitoner of the Union's loss of majority (R. 151-152).

From petitions signed by the employees, the Board *administratively determined* the "Decertification Petitioner had an adequate and *timely* showing of interest to support its Petition". This determination was made a part of the record (R. 154). At the time of the Decertification Petition

the Board does not claim the Union represented a majority and, moreover, admits sufficient employee support to raise a "question of representation". The Petition was timely filed after the "Certification Year", but the Board overcame this hurdle by extending the "Certification Year" for six months in order to nullify the Decertification Petition. The union is, therefore, an openly repudiated minority union.

The Board's extension was based on three named grounds only (R. 41-42):

(1) The unit placement dispute.

(2) Advice received by the Union from the Regional Director.

(3) Delay arising from the Union's Motion for Clarification.

However, the lower Court did not rely on any of the Board's three stated grounds but relied on another new ground — Petitioner's "failure to bargain". The lower Court's reliance on this new ground is especially unreasonable, because at the Decertification Hearing the Board refused to hear evidence on or to consider the "bargaining history" or any failure to bargain. Petitioner relied and was entitled to rely on the Board's declarations.

The Motion to Clarify and the Decertification Petition were consolidated for a joint hearing; after the hearing, the Board determined the unit placement of the 11 employees, dismissed the Decertification Petition and ordered Petitioner to bargain for six additional months (R. 44). Petitioner refused to bargain, because the Board's extension of the certification year was unlawful, arbitrary and unreasonable. The validity of the lower Court's enforcement of this "order to bargain" is now the ultimate issue.

PETITIONER IS NOT EVEN ACCUSED OF AN UNFAIR LABOR PRACTICE PRIOR TO THE END OF THE CERTIFICATION YEAR — In spite of the lower Court's new, bizarre "failure to bargain" finding, Petitioner was neither accused nor convicted of any unfair labor practice during the certification year. The Board did not find that the Union's loss of majority was caused by the employer's fault or any unfair labor practice.

The Union filed a wrongful refusal to bargain charge on March 28, 1961; after receiving Petitioner's denial, the Union and Regional Director withdrew the charge (R. 40).

The lower Court assumed Petitioner would have been convicted, if tried on this charge. A Board order may not reasonably be enforced by assuming Petitioner would have been convicted, if tried on another and dismissed charge.

HOLDING BELOW

The Fifth Circuit held:

> ". . . that there is a good deal of weight in the board's position, that its action in this case was not beyond its powers; and, in view of the undisputed evidence as to '*earlier failure to bargain*', we think the board's action, in making the order dismissing the decertification petition and granting the union an additional six months beyond the certification year in which to bargain, was reasonable and proper." (Emphasis added)

REASONS FOR GRANTING THE WRIT

The Court enforced the Board's order to bargain, because of its new, novel finding that Petitioner "failed to bargain". This is a novel deviation from the orthodox "refusal to bargain" finding under Section 8 (a)(5) of the Act.

The Board did not find Petitioner "failed to bargain" but based its order on three different grounds, to-wit (R. 41-42):

> ". . . because of the *DISPUTE* which arose *OVER THE UNIT PLACEMENT* of the 11 employees described in its *MOTION FOR CLARIFICATION*, because of the *ADVICE IT RECEIVED FROM THE REGIONAL DIRECTOR* concerning the withdrawal of the 8(a)(5) charge which it has filed, and because of the *FILING OF THE MOTION FOR CLARIFICATION AND THE DELAY* ensuing therefrom it has been deprived of a substantial amount of time necessary to the proper enjoyment of its certification. . . ."

None of the Board's three stated grounds were relied on by the Court, and, believe it or not, the Court's ground for decision was held immaterial by the Board.

THE COURT'S "FAILURE TO BARGAIN" FINDING IS IN DIRECT CONFLICT WITH THE BOARD'S FINDING THAT THE PRIOR BARGAINING HISTORY WAS IMMATERIAL — The "failure to bargain" relied on by the lower court to justify the extension of the certification year is INCREDIBLE in light of the Board's holdings that "failure to bargain" and the bargaining history is not material; this immateriality ruling was made time and again at the hearing on the Decertification Petition. For Example:

> "HEARING OFFICER: Mr. Vickery, I would prefer not to go into the history of bargaining and all that because I don't think it is material . . ." (R. 150)

> "HEARING OFFICER: Well, let's don't argue. Let's don't argue. I have sustained the objection. And I might reiterate that if this is designed to attack the petitioner's showing of interest, it's not admissible.
>
> "If it's designed to attempt to show that there was some conduct which might constitute an unfair labor practice, it is not admissible . . ." **(R. 156)**

"HEARING OFFICER: Well, Mr. McCarty, again that is something that is not in issue in this case. We are not litigating whether the union has attempted to negotiate or whether the employer has attempted to negotiate, or the relations between the parties . . ." (R. 156)

"MR. McCARTY: Well, it should not be so complicated because we have not exercised all of the reasonable means to get together and conclude a satisfactory contract, excluding or including —"

"HEARING OFFICER: Well, let's not pursue that any further. It's not really material. . . ." (R. 157)

"MR. KENNEY: It was brought out by the attorney for the employer that it was the fault of the union that negotiations never took place after they —

"MR. VICKERY: I object to that argument because there's nothing in the record to support it.

"HEARING OFFICER: I don't think that's material, Mr. Kenney. Actually we're not here for the purpose of exploring prior negotiations." (R. 159)

These rulings were affirmed by the Board (R. 41):

'The consolidated hearing was held before C. L. Stephens, Hearing Officer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.'"

After these plain assurances that prior negotiations would not be considered, were not being litigated, and were immaterial, the Court may not reasonably rely on the "forbidden issue" for enforcement. Consideration of these "forbidden issues" without evidence or Board findings is arbitrary and extremely unfair. This is so plainly contrary to the rudimentary elements of fair play, the Court's decision should not be permitted to stand.

The lower Court makes no attempt to reconcile the Board's immateriality holdings with its contrary holding that the bargaining history is the ultimate "benchmark" on which Petitioner's obligations depend. This basic conflict was "swept under the rug" and does not appear on the face of the lower Court opinion.

After the Board repeatedly assured Petitioner that evidence of bargaining history and "prior negotiations" were irrelevant, the lower Court may not reasonably decide the case on the very issue forbidden to Petitioner; this is injustice rendered rank by the Board's contrary assurances. In light of the Board's repeated findings of immateriality, Petitioner submits the Court's reliance on a "failure to bargain" (bargaining history) is contrary to the law, unreasonable and plainly wrong.

Moreover, the Court's reason for granting the extension of the Certification Year — UNDISPUTED EVIDENCE AS TO "EARLIER FAILURE TO BARGAIN" — is without any evidentiary support or fact finding in the record. This decision is manifestly unfair, because Petitioner was precluded from litigating this controlling issue by Board rulings. There is not only no evidence of a "failure to bargain", but, on the other hand, Petitioner was assured that prior negotiations and bargaining history were immaterial:

> "HEARING OFFICER: Mr. Vickery, I would prefer not to go into the history of bargaining and all that because I don't think it is material . . ." (R. 150)

> "HEARING OFFICER: Well, Mr. McCarty, again that is something that is not in issue in this case. We are not litigating whether the union has attempted to negotiate or whether the employer has attempted to negotiate, or the relations between the parties . . ." (R. 156)

"HEARING OFFICER: I don't think that's material, Mr. Kenney. Actually we're not here for the purpose of exploring prior negotiations". (R. 159)

The Fifth Circuit's attempt to turn this case on a new ground which the Board declared irrelevant, requires the exercise of this Court's supervisory powers to confine judicial review within its well established boundaries — i.e., review of the Board's order is limited to the grounds relied on by the Board.

THE BOARD'S DECISION IS NOT BASED ON THE "FAILURE TO BARGAIN" GROUND RELIED ON BY THE COURT — The Board's decision is not based on a "failure to bargain", but is based on the following carefully, plainly, stated grounds (R. 41-42):

> "On the other hand, the Union contends that the decertification petition is not timely and should be dismissed. The Union argues, in effect, that because of the *DISPUTE* which arose *OVER THE UNIT PLACEMENT OF THE 11 EMPLOYEES* described in its Motion for Clarification, because of the *ADVICE IT RECEIVED FROM THE REGIONAL DIRECTOR* concerning the withdrawal of the 8(a)(5) charge which it has filed, and because of the *FILING OF THE MOTION FOR CLARIFICATION AND THE DELAY* ensuing therefrom it has been deprived of a substantial amount of time necessary to the proper enjoyment of its certification. *ON THESE GROUNDS*, the Union moves to dismiss the decertification petition. We find merit in the contentions of the Union." (Emphasis added.)

Although the Board did not FIND nor BASE its decision on a "failure to bargain", the Court, nevertheless, found and relied only on a "failure or refusal to bargain"; "failure to bargain or the bargaining history" ground was suggested for the first time by the Court. Furtheremore, during the

representation hearing, the Board, time and again assured Petitioner a refusal to bargain, prior negotiations and prior failure or refusal to bargain were immaterial. (R. 150, 156, 157 and 159).

The Board's announced ground — "because of the dispute which arose over the unit placement of eleven employees described in its (the Union) Motion for Clarification" — may not be reasonably equated with the Court's "failure to bargain". A dispute may arise as an integral part of "good faith" bargaining without any "failure or refusal to bargain". Each of the other Board grounds for decision — (1) delay on the "Motion to Clarify", and (2) Regional Director advice — is as far from a "failure to bargain" as the infinite is from zero.

Securities and Exchange Commission v. *Chenery Corporation*, 318 U.S. 80, conflicts with the Court's decision, because the Board did not base its action on a "failure to bargain", and CHENERY teaches that the Court must judge the Board's order on the Board's grounds. Although *CHENERY* is an S.E.C. rather than an N.L.R.B. case, the same basis for judgment applies to Board proceedings. This is very important to the administration of the Act and should be firmly established in the jurisprudence. The Board's order must stand or fall upon the basis the record discloses was the basis for the Board's action:

> ". . . Its opinion plainly shows that the Commission purported to be acting only as it assumed a court of equity would have acted in a similar case. Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. THE GROUNDS UPON WHICH AN ADMINISTRATIVE ORDER MUST BE JUDGED ARE THOSE UPON WHICH THE RECORD DISCLOSES THAT ITS ACTION WAS BASED.

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason' . . . " (S.E.C. v. CHENERY CORP., 318 U.S. 80 at 87, 88).

Since the decision of the Board was explicitly based upon three stated grounds, its validity must be judged on the three stated grounds. Because the only basis for enforcement was a new ground which the Board rejected as immaterial, the Court's enforcement of the Board's order is plainly unlawful.

This rule has been frequently applied to N.L.R.B. proceedings in the Courts of Appeals. See *U.A.W.* v. *N.L.R.B.*, 300 F.2d 699 (C.A.-D.C.); *N.L.R.B.* v. *Landy Manufacturing Corporation*, 286 F.2d 424 (C.A. 2). CHENERY precludes the lower Court's reliance on its "failure to bargain" motion, because the Board did not base its action on this ground. The Board's order should be judged upon the Board's grounds; the Court may not substitute a different ground or basis for enforcing the decision, a fortiori, the Court may not reasonably rely on the ground the Board found immaterial and repeatedly assured Petitioner would not be considered.

THE BOARD HAD NO DISCRETION TO EXTEND THE CERTIFICATION YEAR — 29 U.S.C. 159(c)(1)(2) and (3) provide for decertification petitions after one year; the Board had no discretion to extend the certification year so as to deny the statutory decertification election. The statutory command is unequivocal, 29 U.S.C. 159(c)(1):

> ". . . IF THE BOARD FINDS upon the record of such hearing that such a QUESTION OF REPRE-

SENTATION EXISTS, IT SHALL DIRECT AN ELECTION by secret ballot and shall certify the results thereof." (Emphasis added)

The statute prescribes only one "benchmark" — whether or not a "question of representation exists" — and clearly commands a "finding" on this issue. The direction to make a "finding" on the statute's "benchmark" may not reasonably be equated with enlarging the Board's discretion to roam unconfined and vagrant. The "benchmark" establishes the STATUTORY STANDARD rather than DISCRETION as the only condition to decertification.

The Board made no express finding of whether or not "a question of representation exists", the only ultimately relevant finding. Petitioner submits that the Board believed a "question of representation existed"; and, nevertheless, avoided the statute's direction to order an election by arbitrarily extending the certification year. This will not do, because the statute leaves no room for discretion to extend the statutory 12 months for the certification year nor to ignore the statutory "benchmark".

The Board's failure to make a finding on the "question of representation" issue is even more remarkable in light of the fact that it was necessary for the Board to have a "reasonable cause to believe that a question of representation existed", before ordering the December hearing on the decertification petition. This is made plain in 29 U.S.C. 159(c)(1)(B):

> ". . . if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . ."

The statute (29 U.S.C. 159(c)(1)) provides, "if the Board finds . . . , it shall direct an election". The phrase "it shall direct an election" could not be plainer, could not be more

precise, and could not more clearly leave NOTHING to the Board's discretion, if and when the statutory finding is made.

Petitioner submits the statutory command makes a decertification election available upon the statutory showing of a "question of representation" rather than by the grace or at the discretion of the Board. Moreover, the statute (29 U.S.C. 159(c)(3)) does not commit the length of the certification year to either the Board's grace or discretion.

THE UNIT PLACEMENT DISPUTE IS NOT A "FAILURE TO BARGAIN" — Although the Board carefully excluded all evidence of bargaining and "prior negotiations", the Court may have been misled into the erroneous holding of a "failure to bargain" by the unit placement dispute.

Petitioner took the position that the resolution of unit placement was mandatory while the union took the position that unit placement was irrelevant (R. 138-140). Finally, in May of 1961, the union and the Labor Board accepted the Petitioner's view, and the Motion for Clarification was filed (R. 33-36). Petitioner's insistence on the resolution of this issue cannot be fairly tortured into a refusal or failure to bargain. This is especially true, because the union and the Board adopted Petitioner's position. The last exchange of correspondence on this issue, Petitioner's letter of May 11, 1961, was conciliatory and invited further negotiations:

> "The hotel is patiently awaiting your statement of position to each of these eleven employees and is unable to understand why the union cannot define who it claims to represent." (R. 138-140)

Since bargaining was invited by Petitioner on May 11, 1961, and there is no evidence of any subsequent "failure to bargain", the Court's finding of a "failure to bargain" is grossly

unfair, intuitive and without basis in the record. The fact that the finding is of a "FAILURE" rather than the conventional "REFUSAL TO BARGAIN" indicates the Court was unwilling to find a "refusal" to bargain. The failure to bargain finding is as unwarranted as a refusal to bargain would have been; in fact, as in *N.L.R.B.* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630 (C.A. 5) there may be no "failure to bargain" by an employer without a refusal, because the union rather than the employer must request bargaining. The Court's finding that the undisputed evidence establishes a "failure to bargain" is bizarre; this is especially true, because the Board excluded evidence on this issue.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In a nutshell the reasons for granting the writ are:

(1) The Fifth Circuit's decision enforcing the Labor Board Order based on a reason or ground not found nor relied on by the Board conflicts with the standards of judicial review established in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80 and the holding of other circuits in labor board cases. *U.A.W.* v. *N.L.R.B.*, 300 F. 2d 699 (C.A. — D.C.) and *N.L.R.B.* v. *Lundy Manufacturing Corporation*, 286 F. 2d 424 (C.A. 2). Although *Chenery* reviews an Order of the S.E.C., the same rule should apply to review of a Labor Board decision based on stated grounds. The resolution of this conflict looms large in the daily administration of the Act and is a special and important reason for granting this writ.

(2) The Fifth Circuit's failure to limit its review of the Board's orders to the grounds relied on by the Board calls for an exercise of this Court's power of supervision in order to assure proper judicial review in the daily administration of the Act.

(3) The Fifth Circuit's reliance on a ground for extension of the certification year which was rejected by the Board is manifestly improper judicial review which calls for an exercise of this Court's supervisory powers to assure that judicial review is confined within its proper boundaries.

CONCLUSION

For each of the foregoing reasons, Petitioner submits a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

A copy of this Brief and Petition has been served pursuant to Rule 33 by depositing two copies of this Petition in a U. S. Mail Box, with air mail postage prepaid addressed to:

Solicitor General
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